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13
 14 UNITED STATES DISTRICT COURT
 15 DISTRICT OF NEVADA

16 UNITED STATES FOR THE USE AND
 17 BENEFIT OF AGATE STEEL, INC.;
 18 AGATE STEEL, INC., an Arizona
 19 corporation,

20 Plaintiffs,
 21 vs.

22 JAYNES CORPORATION, a New Mexico
 23 corporation; WESTERN SURETY
 24 COMPANY, a South Dakota corporation,

25 Defendants.

26 JAYNES CORPORATION, a New Mexico
 27 corporation,

28 Third-Party Plaintiff,
 29 vs.

30 AMERICAN STEEL CORPORATION, a
 31 Nevada corporation, THE OHIO
 32 CASUALTY INSURANCE COMPANY, a
 33 foreign corporation,

34 Third-Party Defendants.

35 CASE NO. 2:13-cv-01907-APG-NJK

36 ~~PROPOSED~~ PROTECTIVE ORDER RE
 37 DISCLOSURE OF CONFIDENTIAL
 38 INFORMATION

39 **As amended,
 40 pages 4, 7**

41 Defendant/Third-Party Plaintiff, Jaynes Corporation, Inc. ("Jaynes") and Defendant
 42 Western Surety Company ("Western"), by and through their counsel, Snell & Wilmer, L.L.P., and
 43 Plaintiff United States for the Use and Benefit on behalf of Agate Steel, Inc. ("Agate") by and
 44 through their counsel, Law Offices of Timothy D. Ducar, PLC and Third-Party Defendant

1 American Steel Corporation (“American Steel”) and Ohio Casualty Insurance Company (“Ohio
2 Casualty”), by and through their counsel, Cheifetz, Iannitelli, Marcolini, P.C. (collectively the
3 “Parties”) will be required under Federal Rules of Civil Procedure, or pursuant to written
4 discovery requests, to produce documents and/or information that contain proprietary, sensitive,
5 and confidential national security information. Dissemination of this information to the public
6 poses a national security threat to U.S. military operations and national security. The prime
7 contract between Jaynes and the Army Corps includes the following provision:

11 (1) The Contracting Officer has given prior written approval; or

(2) The information is otherwise in the public domain before the date of release.

13 (b) Requests for approval shall identify the specific information to be released, the
14 medium to be used, and the purpose for the release. The Contractor shall submit
15 its request to the Contracting Officer at least 45 days before the proposed date for
release.

16 (c) The Contractor agrees to include a similar requirement in each subcontract
17 under this contract. Subcontractors shall submit requests for authorization to
release through the prime contractor to the Contracting Officer.

18 (Prime Contract, Defense Federal Acquisition Regulation Supplement (“FARS”) § 252.204-
19 7000.) Additionally, the Subcontract Agreement between Jaynes and American Steel states that
20 “[t]o the extent the Prime Contract provides for the confidentiality of any of the Owner’s
21 proprietary or otherwise confidential information disclosed in connection with the performance of
22 this Agreement, the Subcontractor is equally bound by the Owner’s confidentiality requirements.”
23 (Subcontract Agreement § 3.29.)

24 Prohibiting all parties from disclosing confidential documents and information produced
25 in this litigation to any individual or entity outside of this litigation, or from otherwise using
26 documents produced outside of this litigation is necessary and appropriate in this matter, to
27 preserve the confidentiality of military documents and information, and minimize any threat to
28 national security. *See Fed. R. Civ. P. 26(c); Phillips v. General Motors Corp.*, 307 F.3d 1206 (9th

1 Cir. 2002). Indeed, “[t]he unique character of the discovery process requires that the trial court
 2 have substantial latitude to fashion protective orders.” *Phillips v. General Motors Corp.*, 307
 3 F.3d 1206, 1212 (9th Cir. 2002) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).)

4 The Court finds that there is good cause to enter this protective order, as the threat to
 5 national security represents a specific harm that could result if the information is not protected.
 6 *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). Moreover the
 7 balancing of protecting both public and private interests weighs in favor of this Order. *Phillips v.*
 8 *General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

9 Accordingly, after consideration of the Jaynes’ Motion for Protective Order, and for good
 10 cause appearing therefore, the Motion is **GRANTED**.

11 **IT IS HEREBY ORDERED** that the following terms and procedures shall govern the
 12 production and non-disclosure of Confidential Information, as defined herein, for the above-
 13 captioned litigation:

14 1. **Protective Order.** This Order provides the Parties the flexibility to designate on a
 15 case-by-case basis particular documents or information as confidential when a good faith basis
 16 exists for doing so. Any discovery response, information, document or thing produced, and/or all
 17 deposition testimony given in connection with this litigation that contains sensitive information
 18 may be designated as Confidential Information.

19 2. Confidential Information entitled to confidential treatment may include all
 20 documents and information the Parties deem confidential including: (a) all project paper, tapes,
 21 documents, designs, drawings, plans, email correspondence, other correspondence, disks,
 22 diskettes, emails and other electronic data, and other tangible things produced by or obtained
 23 from any person in connection with this litigation; (b) Rule 26 disclosures, answers to document
 24 requests, interrogatories, and requests for admission; (c) transcripts of depositions, in whole or in
 25 part, and exhibits thereto; and (d) all copies, extracts, and complete or partial summaries or charts
 26 or notes prepared or derived from such papers, documents or things. The handling of such
 27 information shall be made in accordance with the terms of this Order.

1 3. A discovery response, information, document or thing produced, and/or all
 2 deposition testimony may be designated as Confidential Information by one of the following
 3 methods:

4 a. In the case of documents or other materials (apart from depositions or other
 5 pretrial testimony): by affixing the legend "Confidential" to each page containing any
 6 Confidential Information, except that in the case of multi-page documents bound together by
 7 staple or other permanent binding, the word(s) "Confidential" need only be stamped on the first
 8 page of the document in order for the entire document to be treated as Confidential; and,

9 b. In the case of depositions, including exhibits thereto, or other pretrial
 10 testimony: (i) by a statement on the record, by any counsel or the deponent, at the time of such
 11 disclosure; or (ii) by written notice from any Party's counsel or the deponent or his/her counsel,
 12 within ten business days after receiving a copy of the transcript thereof, designating all or some of
 13 the transcript and/or documents referred to therein as Confidential. Such written notice must be
 14 sent to counsel for all Parties, the deponent and counsel for the deponent. Only those portions of
 15 the transcripts so designated as "Confidential" must be treated as Confidential. The Parties may
 16 modify this procedure for any particular deposition, by a writing signed by counsel for all Parties
 17 and by the deponent or counsel for the deponent, without further order from the Court.

18 4. The designation "Confidential" shall apply to materials and information that may
 19 be disclosed to the Parties and others identified in this Order for the purposes of the litigation, but
 20 which is intended to be protected against disclosure to third parties. Absent a specific order by
 21 the Court to the contrary, all documents and information ^{that is designated as "Confidential"} ~~shall be used by the Parties~~
 22 solely in connection with this litigation, and not for any business, competitive, other litigation or
 23 governmental purpose or function, and such information shall not be disclosed to anyone except
 24 as expressly provided herein.

25 5. Any Party may, at any time, request or contest in writing that any Confidential
 26 Information be released from the requirements of this Order. A Party who makes such a
 27 contention shall be referred to in this Order as the "Requesting Party." Upon written contention,
 28 the Party claiming that information is "Confidential", referred to in this Order as the "Designating

1 Party", shall meet and confer with the Requesting Party within ten (10) days of receipt of a
2 written request therefor. If an agreement cannot be reached by negotiation, and the Court has not
3 provided for a different procedure to handle such disputes, then the Designating Party may make
4 an application for a ruling from the Court on the continued application of the "Confidential"
5 designation of such information or document. The Designating Party shall submit the contested
6 Confidential Information to the Court for in camera inspection, and the terms of this Stipulation
7 and Protective Order shall continue to apply to such Confidential Information until the Court
8 rules on the application.

9 6. Confidential Information and information derived from Confidential Information,
10 including without limitation any testimony about an exhibit designated as Confidential, shall not
11 be disclosed except as set forth herein. All Confidential Information produced and information
12 related thereto disclosed by any Party shall be used solely for this litigation and may not be used
13 for any other purpose.

14 7. Confidential Information may only be disclosed to the following persons:
15 a. any Party and counsel of record for any Party to this action;
16 b. paralegal, stenographic, clerical and secretarial personnel currently
17 employed by a Party to the case, (including but not limited to photocopy service personnel and
18 document management vendors, such as coders and data-entry personnel, retained by outside
19 counsel);
20 c. stenographic, video or audio court reporters engaged to record depositions
21 in this litigation, and certified interpreters and/or translators for those depositions, if any;
22 d. non-party expert(s) or consultant(s) and their secretarial, technical and
23 clerical employees (including but not limited to photocopy service personnel and document
24 management vendors, such as coders and data-entry personnel, retained by outside counsel) who
25 actively assist in the preparation of this action;
26 e. any person identified on the face of any such Confidential Information as
27 an author or recipient thereof;
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f. any person who is determined to have been an author and/or previous recipient of the Confidential Information, but who is not identified on the face thereof, provided there is prior testimony of actual authorship or receipt of the Confidential Information by such person prior to such person being shown any Confidential Information;

g. any non-party engaged by the Parties or appointed by the Court for purposes of acting as a Discovery Referee, Special Master, and/or neutral arbitrator or mediator in any alternative dispute resolution procedures in which the Parties may participate; and

h. any other person by written agreement among all Parties' counsel, or by order of the Court;

8. Each individual identified in paragraphs 7 (a) - (h) above to whom Confidential Information is furnished, shown, or disclosed shall, prior to the time he or she receives access to such materials, be provided by counsel furnishing him or her such material a copy of this Order. Counsel disclosing Confidential Information shall advise said persons of the provisions of this Order and secure adequate assurance of confidentiality and agreement from that person or entity: (1) to be bound by the terms hereof, (2) to maintain the received Confidential Materials in confidence, and (3) not to disclose the received Confidential Materials to anyone other than in accordance with the terms of this Order.

9. The foregoing is without prejudice to the right of any Party to this Order to:

- a. seek to modify or obtain relief from any aspect of this Order; or
- b. object to the use, relevance, or admissibility at trial or otherwise of any material, whether or not designated in whole or in part as Confidential Information governed by this Protective Order.

10. Nothing in this Order shall prohibit a Party from using Confidential Materials for deposition preparation, use during a deposition, or from marking any Confidential Materials as an exhibit to a deposition and examining the deponent thereon. Likewise, nothing in this Order shall prohibit a Party from using Confidential Materials for examination of a witness at trial, or from marking any Confidential Materials as an exhibit during trial and examining a trial witness thereon.

1 11. If Confidential Information is disclosed at a deposition, only the stenographic,
 2 video or audio reporter and those persons who are authorized by the terms of this Order to receive
 3 such material may be present. The portions of the transcripts of all testimony designated as
 4 Confidential Information shall be labeled with the appropriate designation by the reporter. If any
 5 document or information designated as Confidential Information pursuant to this Order is used
 6 during the course of a deposition, that portion of the deposition record reflecting such material
 7 shall be labeled with the appropriate "Confidential" designation.

8 12. **Procedure for Request to Seal.** See order issued ~~the Clerk of the Court, as
 9 concurrently herewith~~
 10 such filing may be required or permitted by the ~~local rules of this Court~~, which contains or has
 11 attached to it Confidential Information, shall be submitted to this Court for an *in camera* review
 12 and a case-by-case determination as to whether the Confidential Information submitted shall be
 13 sealed. For good cause shown, the Court may order that such Confidential Information shall be
 sealed.

14 13. In the event of a hearing or trial in this matter at which any Party intends to present
 15 information or materials designated hereunder as Confidential, counsel for the Parties will meet
 16 and confer to determine what safeguards are necessary to protect against the disclosure of the
 17 designated information or materials, and shall attempt to determine the least intrusive and
 18 burdensome means of protecting such materials during the proceeding. Counsel for the Parties
 19 shall confer on appropriate procedures for protecting the confidentiality of any documents,
 20 information and transcripts used in the course of any court proceedings, and shall incorporate
 21 such procedures into the pre-trial order. For trial, the Party seeking to use information designated
 22 Confidential without redacting the Confidential portion of the information, shall, via written
 23 motion in limine filed and served pursuant to the Court's trial scheduling order, submit all such
 24 information (document, transcript, interrogatory answer, etc.) to the trial judge under seal for *in*
 25 camera review, and a decision on whether such information can be used at trial, and if so, what
 26 limitations, if any, shall apply.

27 14. This Order shall survive the termination of this action and shall continue in full
 28 force and effect thereafter. Within thirty (30) calendar days after the termination of this action and

1 the expiration of any and all rights of appeal or further appeal or the expiration of time to seek
 2 leave to appeal, all persons or entities that have received Confidential Materials shall return all
 3 such Confidential Materials to counsel for the designated Party. As an alternative to returning all
 4 or part of such Confidential Materials, persons or entities may certify in writing for the producing
 5 Party that they have destroyed all unreturned Confidential Materials. Where a Party has provided
 6 Confidential Materials to a retained expert or consultant or any other person or entity, it shall be
 7 the responsibility of that Party to obtain the return or destruction of the Confidential Materials
 8 from such expert or consultant. This paragraph does not apply to the copies of Confidential
 9 Materials that have been submitted to and are in the possession of the Court. This Order shall not
 10 preclude the use or disclosure of any Confidential Materials during the trial of this action, subject
 11 to the right of any Party to seek an Order governing use of the Confidential Materials at trial.

12 15. Within fifteen (15) days of the close of this action, whether by judgment, order,
 13 settlement or other means, the Parties must return all information, and copies thereof, in their
 14 possession to the Party that served the Confidential Information.

15 16. If at any time any Confidential Information protected by this Order or information
 16 produced in this litigation is subpoenaed from the receiving party by any court, administrative or
 17 legislative body, or is requested, via formal discovery request or otherwise, by any other person
 18 or entity purporting to have authority to require the production of such information, the party to
 19 whom the subpoena or other request is directed shall, within three (3) business days of receipt,
 20 give the other party hereto notice of said request. The party receiving the discovery request or
 21 subpoena shall in the interim take all necessary steps to protect the potentially Confidential
 22 Information and all information so designated in this case as if it were its own confidential
 23 information. The party receiving notice of a pending discovery request, subpoena, or other
 24 inquiry, shall have three (3) business days to, in writing, advise the party from whom the
 25 discovery was requested of its intent to protect the confidentiality of the information sought, or of
 26 its decision to allow it to be disclosed. The party objecting to the disclosure of the Confidential
 27 Information shall take all steps it deems necessary at its own expense, including incurring and
 28 paying its own attorney's fees. It is acknowledged and agreed that any violation or threatened

1 violation of this provision by any Party will cause immediate and irreparable harm entitling the
2 other party to obtain injunctive relief, including a temporary restraining order without notice
3 pending a hearing on an application for preliminary injunction in addition to all other legal
4 remedies available.

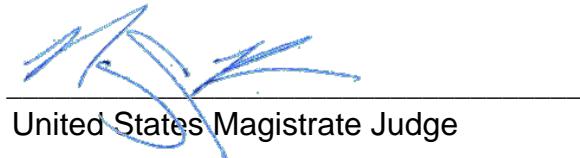
5 17. The terms of this Order shall be effective and enforceable as between the Parties
6 immediately upon its execution by counsel for such parties.

7 18. All persons subject to the terms of this Order agree that this Court shall retain
8 jurisdiction over them for the purpose of enforcing this Order.

9 19. This Order may only be amended or modified by written agreement of the parties
10 hereto and approved by this Court, or by order of this Court.

11 **IT IS SO ORDERED.**

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13 Dated: May 21, 2014

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15 United States Magistrate Judge

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1 Respectfully submitted,

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